Supreme Court, U.S.
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No. 93-609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FIRST REPUBLICBANK CORPORATION, IFRB CORPORATION, MORGAN STANLEY & CO. INCORPORATED, GOLDMAN, SACHS & CO., ERNST & YOUNG, SALOMON BROTHERS INC,

Petitioners,

v.

PACIFIC MUTUAL LIFE INS. CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 18, 1993
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39 pp

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

No. 91-CV-441

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
February 1, 1991	Complaint filed by Pacific Mutual Life Ins. Co.
February 15, 1991	Amended Complaint filed by Pacific Mutual Life Ins. Co.
April 12, 1991	Motions filed by Morgan Stanley & Co., Goldman Sachs & Co., and Ernst & Young & Co. to dismiss the First Amended Complaint
April 15, 1991	Motion filed by Ernst & Young to dismiss the first amended complaint.
July 9, 1991	Motion filed by defendants to supplement their pending motions to dismiss the first amended complaint.
August 15, 1991	Order filed granting defendants' motion to supplement their pending motions to dismiss the first amended complaint. First amended complaint dismissed with prejudice in its entirety.
August 16, 1991	Memorandum Order and Opinion. Defendants' Motion to Dismiss Count I

	of Plaintiffs' First Amended Complaint is granted and Count I dismissed with prejudice as time-barred. Defendants' motions to dismiss Count II of Plaintiffs' Amended Complaint, are granted and Count II dismissed without prejudice.
August 16, 1991	Case Closed.
August 30, 1991	Order granting motion to amend last three paragraphs of order of August 15, 1991 to read: 1) Count I of the First Amended Complaint is dismissed with prejudice; and 2) Count II of the First Amended Complaint is dismissed without prejudice.
January 31, 1992	Motion by Pacific Mutual Life Ins. Co. to reinstate action.
January 31, 1992	Memorandum by Pacific Mutual Life Ins. Co. to reinstate action.
February 20, 1992	Memorandum by Defendants in Opposition to motion to reinstate action.
March 2, 1992	Reply Memorandum by Pacific Mutual Life Ins. Co. in response to motion to reinstate action.
July 13, 1992	Memorandum Opinion and Order denying motion to reinstate action.
August 7, 1992	Notice of Appeal by Pacific Mutual Life Insurance Co. from the order denying its motion to reinstate this action entered on July 13, 1992.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-CV-1662

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
August 7, 1992	Notice of Appeal filed by Pacific Mutual Life Ins. Co.
May 3, 1993	Case heard before Politz, Reavley, Barksdale, C.J.J.
July 30, 1993	Opinion and Judgment of the Court of Appeals of the Fifth Circuit
July 30, 1993	Judgment filed
October 18, 1993	Filing of Petition for writ of certiorari by defendants.
January 10, 1994	Order granting Petition for Writ of Certiorari filed

CHRONOLOGICAL LIST OF ITEMS APPEARING ELSEWHERE

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the United States District Court for the Northern District of Texas dated August 16, 1991 ..... B-1

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action

No. CA3-91-0441-D

PACIFIC MUTUAL LIFE INSURANCE CO.,

Plaintiff,

v.

FIRST REPUBLICBANK CORPORATION, IFRB CORPORATION, MORGAN STANLEY AND CO., INCORPORATED., GOLDMAN SACHS & CO., ERNST & YOUNG & CO., and SALOMON BROTHERS INC.,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO REINSTATE ACTION

Plaintiff Pacific Mutual Life Insurance Co. (''Pacific Mutual'') respectfully submits this memorandum of law in support of its motion to reinstate this action.

I. Introduction

This action arises out of plaintiff's purchases in July and September 1987 of InterFirst 12-¾% Notes due October 1, 1987. Plaintiff instituted this action against the defendants on March 1, 1991, asserting claims under Section 10(b) of the Securities Exchange Act of 1934 (Count I) and for common law fraud (Count II). Defendants subsequently filed motions to dismiss, contending, among other things, that plaintiff's claims were time barred under the Supreme Court's recent decision in *Lampf, Pleva, Lifkind, Prupis & Petigrow* v. *Gilbertson*, 111 S.Ct. 2773 (1991). On August 15, 1991, this Court dismissed Count I of plaintiff's first amended

complaint as time barred under *Lampf*. This Court also dismissed Count II based on its declination to exercise pendent jurisdiction. As discussed below, plaintiff's action should be reinstated under a recently enacted amendment to the Securities Exchange Act of 1934 (''Exchange Act'').

II. Plaintiff's Action Should Be Reinstated Under Section 27A of the Exchange Act

On December 19, 1991, President Bush signed the *Federal Deposit Insurance Corporation Improvement Act of 1991*, Pub.Law 102-242, 1991 S.543, 105 Stat. 2236 (''the Act''), which amends the Exchange Act by adding section 27A. Section 27A provides in pertinent part:

> (b) Effect on Dismissed Causes of Action. Any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991 —
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> *shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.*

(emphasis added).

Under section 27A, a section 10(b) action that was dismissed as untimely must be reinstated *if* it was timely under the law as it existed in the applicable jurisdiction on June 19, 1991, the day before *Lampf* was decided. Accordingly, in deciding this motion, this Court should look at applicable Fifth Circuit law as of June 19, 1991. *See also James Bankard, et al.* v. *First Carolina Communication, Inc., et al.*,

1992 U.S.Dist. LEXIS 53 (N.D. Ill. January 3, 1992) (analyzing whether the plaintiffs' claims were timely under Seventh Circuit law as of June 19, 1991).

Prior to *Lampf*, it was well settled law that in securities actions filed in Texas District courts, the Fifth Circuit borrowed the most closely analogous state statute of limitations. *Sioux Ltd., Sec. Litigation* v. *Coopers & Lybrand*, 914 F.2d 61 (5th Cir. 1990). In *Sioux*, the Fifth Circuit reaffirmed its long standing position regarding the borrowing of the most closely analogous Texas statute of limitations and held that the statute of limitations for section 10(b) action was four years. *Id.* at 64, *citing Longden* v. *Sunderman*, 737 F. Supp. 968, 971-972.

Here, plaintiff's Section 10(b) claim was filed on March 1, 1991, well within this four year period and thus, is timely under existing Fifth Circuit precedent as of June 19, 1991. Further, plaintiff has brought this motion within 60 days of the enactment of Section 27A. Accordingly, plaintiff's section 10(b) claim should be reinstated under Section 27A. Plaintiff's common law fraud claim should also be reinstated since an independent basis for the Court's jurisdiction would exist.

III. Conclusion

For the foregoing reasons, plaintiff respectfully requests the Court to grant plaintiff's motion to reinstate this action.

Dated: January 30, 1992

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action

No. CA3-91-0441-H

PACIFIC MUTUAL LIFE INSURANCE CO.,
Plaintiff,

v.

FIRST REPUBLICBANK CORPORATION, IFRB CORPORATION, MORGAN STANLEY AND CO., INCORPORATED., GOLDMAN SACHS & CO., ERNST & YOUNG & CO., and SALOMON BROTHERS INC.,
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action

No. CA3-91-0441-H

PACIFIC MUTUAL LIFE INSURANCE CO.,
Plaintiff,

v.

FIRST REPUBLICBANK CORPORATION, IFRB CORPORATION, MORGAN STANLEY AND CO., INCORPORATED., GOLDMAN SACHS & CO., ERNST & YOUNG & CO., and SALOMON BROTHERS INC.,
Defendants.

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO REINSTATE ACTION

TO THE HONORABLE CHIEF JUDGE OF THE DISTRICT COURT:

Defendants Ernst & Young, Goldman, Sachs & Co., Morgan Stanley & Co. Incorporated and Salomon Brothers Inc (''Defendants'') respectfully submit this response in opposition to plaintiff's Motion to Reinstate Action. Plaintiff seeks reinstatement of this action, which the Court dismissed on August 15, 1991, based on the recent enactment of federal legislation in response to the Supreme Court's decision regarding the statute of limitations applicable to implied causes of action under Section 10(b) of the Securities Exchange Act of 1934 (''Section 10(b)''), 15 U.S.C. § 78j(b).

Because the new legislation is unconstitutional, the Court should deny the motion to reinstate.[1]

BACKGROUND

On June 20, 1991, the Supreme Court held that actions brought under Section 10(b) must be commenced within one year of discovery of the facts constituting the violation and, under no circumstances, later than three years after the violation. *See Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773, *reh'g denied*, 112 S. Ct. 27 (1991). In another decision issued that same day, *James B. Beam Distributing Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), the Supreme Court held that where changed principles of law are applied to the parties in the proceeding in which they are enunciated, the newly-adopted rules must be also applied in all other pending proceedings.

In a Memorandum Opinion and Order signed August 15, 1991, and entered on the following day, this Court dismissed with prejudice plaintiff's Section 10(b) claim as time-barred under the holdings in *Lampf* and *James B. Beam* and dismissed without prejudice plaintiff's pendent state common-law fraud claim.[2] *See* Mem. Op. & Ord. at 9.[3]

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1. Defendants respectfully refer the Court to Rule 24(c), Fed. R. Civ. P., which provides that "[w]hen the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403."

2. A copy of the Court's Memorandum Opinion and Order is annexed to this response as Appendix A.

3. Similarly, following James B. Beam, most federal courts have applied the limitations period prescribed by Section 9(c) of the 1934 Act to Cases pending on June 20, 1991, the day *Lampf* was decided. *See, e.g., Welch* v. *Cadre Capital*, 946 F.2d 185 (2d Cir. 1991); *Boudreau* v. *Deloitte, Haskins & Sells*, 942 F.2d 497 (8th Cir. 1991); *Anixter* v. *Home-State Prod. Co.*, 947 F.2d 897 (10th Cir. 1991); *Held* v. *Davis*, No. 89-6684-CTV, 1991 WL 243139 (S.D. Fla. Nov. 19, 1991); *Baggett* v. *Edward D. Jones & Co.*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,215 (D. Kan. June 27, 1991).

Plaintiff did not appeal the Court's decision and allowed the Court's dismissal order to become a final nonappealable judgment. *See* Fed. R. App. P. 3(a) and 4(a).[4]

Thereafter, Congress debated the issue of the appropriate limitations period for Section 10(b) actions in response to political criticism of *Lampf*. Unable to forge a consensus on any proposal to establish a statute of limitations for Section 10(b) actions, Congress, by voice vote in a hasty political compromise,[5] enacted a statute designed to remove the retroactive application of the *Lampf* decision. Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), Pub. L. No. 102-242, § 476, 105 Stat. 2236 (1991). Section 476 of the FDICIA amended the Securities Exchange Act of 1934 by adding a new Section 27A entitled "Special Provision Relating to Statute of Limitations on Private Causes of Action." Specifically, Section 27A provides:

> (a) EFFECT ON PENDING CAUSES OF ACTION.—The limitation period for any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

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4. Plaintiff elected, instead, to bring an action in the 192nd District Court of Dallas County asserting its common-law fraud claim.

5. *See* 178 Cong. Rec. S18624 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan).

(b) EFFECT ON DISMISSED CAUSES OF ACTION. — Any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991—

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

Pub. L. No. 102-242, § 476, 105 Stat. 2236. The President signed the FDICIA into law on December 19, 1991, and plaintiff subsequently filed its motion to reinstate this action under Section 476.

Plaintiff's motion, however, should be denied because Section 476 is unconstitutional for two separate, but related, reasons. First, Section 476 violates the separation of powers doctrine which prohibits Congress from "[prescribing] rules of decision to the Judicial Department of the Government in cases pending before it." *United States* v. *Klein*, 80 U.S. 128, 146 (1872). In Section 476, Congress impermissibly attempts to direct the result in statute of limitations challenges to claims brought under Section 10(b) that were filed before the Supreme Court's decisions in *Lampf* and *James B. Beam*. Second, Section 476 improperly invades the province of the judiciary by requiring Article III courts to reinstate finally dismissed actions. *See Hayburn's Case*, 2 U.S. (3 Dall.) 409, 410 n.2 (1792); *cf. United States* v. *Sioux Nation of Indians*, 448 U.S. 381, 427-29 (1980) (Rehnquist, J., dissenting) (distinguishing proceeding in which United States is a party); *Pope* v. *United States*, 323 U.S. 1, 8-9 (1944) (same). The legislation thus deprives private litigants of their vested rights

and eviscerates the principles of finality of judgments that are fundamental to American jurisprudence. *See Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113, (1948); *Hodges* v. *Snyder*, 261 U.S. 600 (1923); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856); *cf. Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 316 (1945) (state statute extending statute of limitations does not violate Fourteenth Amendment because claim had not been finally adjudicated before effective date of legislation).

ARGUMENT

I. SECTION 476 UNCONSTITUTIONALLY ENCROACHES ON THE POWERS OF THE JUDICIAL BRANCH BY DIRECTING THE FEDERAL COURTS TO REOPEN CASES IN WHICH FINAL JUDGMENTS HAVE BEEN ENTERED AND BY PRESCRIBING THE RULES OF DECISION TO RESOLVE LIMITATIONS ISSUES IN THOSE CASES.

In enacting Section 476, Congress did not prescribe a new limitations period applicable to claims under Section 10(b) because Congress could not agree on the limitations period to provide for such claims. *See* 178 Cong. Rec. S18624 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan). Congress did not even prescribe a new limitations period for all Section 10(b) claims pending at the time of its enactment or for all Section 10(b) claims arising out of events that occurred prior to June 20, 1991. Instead, in Section 476, Congress improperly prescribed rules of decision that the federal courts must apply in a specific class of cases, i.e., those cases that were pending on June 19, 1991. In so doing, Congress has violated the principles of separation of powers embedded in the Constitution by encroaching upon the role of the judiciary to decide cases.

Section 476 imposes rules of decision on the federal judiciary by instructing the courts to ignore *Lampf* and select the limitations period that prevailed in the jurisdiction on June 19, 1991. *See, e.g.*, 178 Cong. Rec. S18624 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan). Without overruling *Lampf* or *James B. Beam* or establishing a statute of limitations for Section 10(b) claims, Congress has prohibited the courts from following the holdings in those cases in adjudicating Section 10(b) claims filed before the date of those decisions and has directed the courts to apply the law existing on that date to resolve statute of limitations challenges to such claims. Congress has, thus, attempted to freeze the development of the law by "turning back the clock" to June 19 and removing from the courts the authority to select under time-honored procedures of the common law any limitations period other than the period prevailing in the jurisdiction on the date of the *Lampf* decision. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("[i]t is emphatically the province and duty of the judicial department to say what the law is"). Section 476 is thus an impermissible intrusion upon the traditional common law functions of the federal courts established under Article III of the Constitution. *See generally Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1981).

The legislative history confirms that Congress enacted Section 476 with the express purpose of prescribing rules of decision for specific pending cases:

> In effect the provision in [the legislation] overrules the retroactive effect of Lampf and applies the law as it would have been applied in particular circuits the day before the Lampf decision was decided.
>
> * * *
>
> I think that we are correcting some of the most serious adverse effects the Lampf decision has wreaked upon pending cases.

178 Cong. Rec. S18624 (daily ed. Nov. 27, 1991) (Statement of Sen. Bryan).

Indeed, the proponents of Section 476 proclaimed their intention to prevent dismissal of Section 10(b) claims against particular defendants. *See, e.g.*, 177 Cong. Rec. H11811 (daily ed. Nov. 26, 1991) (statement of Rep. Dingell) (legislation "urgently needed" because *James B. Beam* has resulted in the dismissal of many Section 10(b) actions); 177 Cong. Rec. H11812 (daily ed. Nov. 26, 1991) (Statement of Rep. Markey) (supporting the legislation as necessary because "over $4 billion in fraud claims . . . are threatened with pending dismissal motions solely as a result of *Lampf* and that decision's retroactive application to every securities fraud case pending as of last summer"). The legislative history demonstrates that the driving force behind Section 476 was what its sponsors perceived to be the merits of the claims and their belief that particular defendants should be denied the repose provided by *Lampf*.[6]

Although Congress has the power to prescribe or alter rules of law of general application and even to provide that such rules shall have retroactive effect, *see Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856), Congress may not simply direct the courts to apply a rule of decision of its preference in a specified category of cases while leaving the underlying law unchanged. It is fundamental that Congress "pass(es) the limit which separates the legislative from the judicial power" when it enacts legislation directing the rule of decision in specific pending cases. *United States* v. *Klein*, 80 U.S. 128, 146-47 (1872). This is precisely what Section 476 does. It directs the courts in a defined group of cases, i.e., those asserting Section 10(b) claims commenced on or before June 19, 1991, to follow rules of decision prescribed

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6. *See* 177 Cong. Rec. H11812 (daily ed. Nov. 26, 1991) (Statement of Rep. Markey).

by Congress rather than rules of decision developed and enunciated by the judiciary.

The *Klein* doctrine was recently reaffirmed in *Seattle Audubon Society* v. *Robertson*, 914 F.2d 1311 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 2886 (1991), in which the court held that:

> [T]he critical distinction, for purposes of deciding the limits to Congress' authority to affect pending litigation through statute, is between the actual repeal or amendment of the law underlying the litigation, which is permissible, and the actual direction of a particular decision in a case, without repealing or amending the law underlying the litigation, which is not permissible.

Id. at 1315. Because Section 476 does not change the limitations period applicable to Section 10(b) claims, its selective imposition of rules of decision at variance with judicially created rules is an impermissible violation of the principle of separation of powers enunciated in *Klein* and its progeny.

Plaintiff's motion to reinstate its Section 10(b) claim should be denied for the additional reason that the revival of that claim under Section 27A(b) would deprive Defendants of the right of repose resulting from the earlier dismissal with prejudice of that claim. As early as 1792, the Supreme Court made clear that "no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested. . . ." *Hayburn's Case*, 2 U.S. (2 Dall.) at 410 n.2. Similarly, in *United States* v. *O'Grady*, 89 U.S. 641 (1875), the Supreme Court ruled unconstitutional an attempt by Congress to revise a final judgment entered by the Court of Claims, holding that such judgments "are beyond all doubt the final determination of the matter in controversy; and it is equally certain that the judgment of the Court of Claims, where no appeal is taken to this court are, under existing laws, absolutely conclusive of the rights of the parties, unless a new trial is granted by that Court." *Id.* at 648.

This principle — which preserves the independence of the judiciary — has been reaffirmed in a series of subsequent decisions. Following *Wheeling & Belmont Bridge* and *Klein*, the Supreme Court opined in *Hodges* v. *Snyder*, 261 U.S. 600, 603 (1923), that "the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation." *See also Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. at 113 ("[j]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government"); *McCullough* v. *Virginia*, 172 U.S. 102, 123 (1898), ("[i]t is not within the power of a legislature to take away rights which have been once vested by a judgment"). The Court of Appeals for the District of Columbia more recently recognized the same principle in *de Rodulfa* v. *United States*, 461 F.2d 1240 (D.C. Cir.), *cert. denied*, 409 U.S. 949 (1972). "[A] change of law does *not* retroactively affect a proceeding," the court stated, "which has already been terminated by a final judgment prior to the change." *Id.* at 1252 & n.61 (emphasis added).[7]

In *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945), the Supreme Court recognized that the courts could not be directed to apply a newly-enlarged statute of limitations to upset the result in an action that had been finally adjudicated by the courts. *Chase* involved the question whether it is permissible under the Fourteenth Amendment to apply

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7. Because the United States is not a party to this litigation, it cannot waive or compel Defendants to waive their *res judicata* defense to the reinstitution of plaintiff's Section 10(b) claim. *Cf. United States* v. *Sioux Nation of Indians*, 448 U.S. at 407 ("Congress' mere waiver of the *res judicata* effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers").

legislation enlarging the limitations period for state blue sky claims to claims that would otherwise be time-barred. The Court specifically noted that "[a]s the case stood in the state courts it is not one where a defendant's statutory immunity from suit had been fully adjudicated so that legislative action deprived it of a final judgment in its favor." *Id.* at 310. The Court held that the mere expiration of the limitations period did not preclude application of a new statute of limitations. The Court specifically limited its holdings to cases in which there had not been a final adjudication, stating that "the existence of [a shorter limitations period] at the time the action was commenced did not, under the circumstances, give the appellant a constitutional right against change of policy *before final adjudication*." *Id.* at 316 (emphasis supplied).

Similarly, in *Bankard* v. *First Carolina Communications, Inc.*, No. 89-C-8571, 1992 WL 3694 at * 6 (N.D. Ill. Jan. 6, 1992) — the only reported decision addressing the constitutionality of Section 476 — the court specifically limited its holding to those cases in which there had not been a final adjudication.[8] The court noted that "[t]he present case has not had a final judgment entered" and, therefore, the court did "not consider if the result would be different if § 27A(b) were being invoked to reinstate a closed case." *Id.* at * 7 n.7.

The *Bankard* court's reliance on *Tonya K.* v. *Board of Education of Chicago*, 847 F.2d 1243 (7th Cir. 1988), as the sole

8. In *Bankard*, the court incorrectly concluded that Congress, in enacting Section 476, had changed the underlying law. As discussed above, Congress has not legislated a new limitations period for Section 10(b) claims or altered the period adopted in *Lampf*. Rather, Section 476 directs the federal courts to ignore *Lampf* and *James B. Beam* and apply the rules of decision prevailing in the jurisdiction on June 19, 1991. In dictating by legislative flat the resolution of statute of limitations controversies in a specific class of cases, without purporting to change the underlying law, Section 476 runs afoul of the separation of powers doctrine as construed in *United States* v. *Klein*, 80 U.S. 128.

support for its holding on the constitutionality of Section 476, further supports this distinction. In *Tonya K.*, the Seventh Circuit recognized the validity of the "vested rights" doctrine, observing that "[o]nce the court has fixed property rights by judgment, the legislature has no greater power over this form of property than over any other," citing *Hodges* v. *Snyder*, 261 U.S. 600 (1923), and *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856). Nevertheless, the court upheld the constitutionality of the legislation because the rights of the defendants had never vested through the entry of a final judgment. Judge Easterbrook's discussion of the issue that would have been presented if the defendants' rights had vested is particularly instructive:

> If the defendants wanted to have a judgment (vested or otherwise) on which to rely, they had to secure a dismissal with prejudice in 1984. They did not, and the Constitution does not give them as a gift what they failed to secure when they had the chance.

Tonya K., 847 F.2d at 1248.

Here, by contrast, Defendants have obtained a final judgment dismissing plaintiff's Section 10(b) claim with prejudice. That judgment should have the same effect and should be entitled to the same respect as any other final judgment of an Article III court. To the extent that Section 476 purports to require reinstatement of this action, it is unconstitutional.

WHEREFORE, Defendants respectfully request that the Court deny plaintiff's motion to reinstate and award to Defendants such other and further relief as the Court may deem just and proper.

Dated: February 20, 1992

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause in accordance with Rule 5, Federal Rules of Civil Procedure, on this 27th day of February, 1994.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action

No. CA3-91-0441-H

PACIFIC MUTUAL LIFE INSURANCE CO.,

Plaintiff,

v.

FIRST REPUBLICBANK CORPORATION, IFRB CORPORATION, MORGAN STANLEY AND CO., INCORPORATED., GOLDMAN SACHS & CO., ERNST & YOUNG & CO., and SALOMON BROTHERS INC.,

Defendants.

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO REINSTATE ACTION

In their attempt to avoid reinstatement of this action, defendants Ernst & Young, Goldman, Sachs & Co., Morgan Stanley & Co. Incorporated and Salomon Brothers Inc. (collectively referred to as "Defendants") assert that newly enacted § 27A of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78aaA, is unconstitutional on two grounds. Defendants first claim that § 27A violates the separation of powers doctrine because it allegedly directs the result in "statute of limitations challenges" without changing the underlying law. Defendants then claim that § 27A deprives litigants of their vested rights and "eviscerates the principles of finality of judgment." Defendants' argument has been rejected by virtually every court save one.

As discussed more fully below, contrary to defendants' contentions, § 27A does not direct the Court to make a

particular finding of fact or decision on the merits. *James Bankard, et al.* v. *First Carolina Communication, Inc., et al.*, 1992 U.S.Dist. LEXIS 53 (N.D. Ill. January 3, 1992), (attached as Exhibit A hereto); *Ayers et al.* v. *Sutliffe, et al.*, Slip. Op. No. C-1-90-650 (S.D. Ohio February 11, 1992) (attached as Exhibit B hereto); *VenturTech II. Limited Partnership et al.* v. *Deloitte Haskins & Sells, et al.*, No. 88-1012-Civ-5-H (E.D.N.C. February 24, 1992) (attached as Exhibit C hereto). In addition, defendants' underlying premise is wrong — Congress has changed the underlying law by providing that § 10(b) claims brought on or before June 19, 1991 will be governed by the statute of limitations that existed in the applicable jurisdiction on June 19, 1991. *Id. See* 15 U.S.C. § 78aaA.

Further, defendants incorrectly claim a vested right in this case. Contrary to defendants' contentions, the has not been a final judgment entered in this case, as discussed *infra*. Further, statutes of limitations do not create vested rights. *Chase Sec. Corp.* v. *Donaldson*, 325 U.S. 304 (1945). *See also VenturTech II*, No. 88-1012-Civ-5-H at 4. Accordingly, notwithstanding defendants' protestations to the contrary, Congress' enactment of Section 27A was an appropriate exercise of its legislative power.

I. SECTION 27A OF THE EXCHANGE ACT DOES NOT VIOLATE THE CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS

Section 27A of the Exchange Act is a lawful and constitutional exercise of Congress' power to change the law. The power to make and change the law is vested in Congress by the Constitution. U.S. Constitution, Art. 1, Sec. 1. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 589 (1952) ("The Founders of this Nation entrusted the lawmaking power to the Congress alone.....") As such, Congress has the

"power of passing judgment on the needs of a complex society." *Polish Nat. Alliance* v. *NLRB*, 322 U.S. 643, 650 (1944). The only limitation on this power is that posed by the Constitution. *See Williams* v. *Rhodes*, 393 U.S. 23, 29 (1968).

In determining the constitutionality of a statute, it is a fundamental principle that a court "'asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President . . . should only do so for the most compelling constitutional reasons.'" *Mistretta* v. *United States*, 488 U.S. 361, 384 (1989), quoting *Bowsher* v. *Synar*, 478 U.S. 714, 736 (1986). The Supreme Court has repeatedly reiterated the principle that "every reasonable construction must be resorted to in order to save a statute from unconstitutionality." *Hooper* v. *California*, 155 U.S.648, 657 (1895). *See e.g.*, *Communications Workers* v. *Beck*, 487 U.S. 735, 762 (1988) ("federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and . . . when faced with such doubts the Court will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid."); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Blvd. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

Applying these principles it becomes clear that the only proper interpretation of § 27A is that it is a lawful and constitutional exercise of Congress' legislative power. Indeed, this is the very conclusion reached by a number of courts that have considered the same separation of powers argument as that advanced by defendants. *Bankard*, 1992 U.S. Dist. LEXIS 53 at 8; *Ayers*, Slip. Op. No. C-1-90-650 at 2-5; *VenturTech II*, No. 88-1012-Civ-5-H at 2-4; *Sims et al.* v. *Shearson Lehman Brothers Inc.*, No. CA3-90-252-P (N.D. Tex.

January 29, 1992) (attached as Exhibit D hereto). These courts have all rejected the notion that § 27A directs the courts "to apply a rule of decision of its preference in a specified category of cases while leaving the underlying law unchanged." Defendants' brief, p. 7. In fact, in *Sims*, Judge Solis summarily rejected these same arguments without even allowing the plaintiffs' to respond. See Exhibit D. *See also* defendants' reply brief in *Sims*, referenced in the January 29, 1992 Order, attached as Exhibit E hereto.

In *Bankard*, the court explained:

> Section 27A . . . does not direct the courts to make a particular factual finding or to reach a particular decision on the merits of any securities fraud claim. There is no violation of separation of powers principles . . . Defendants contend Congress cannot change the result of cases without also changing the underlying law. The merits of that argument need not be considered because the underlying premise is false. *Congress has changed the law.* It might seem otherwise only because instead of delineating fully the change of law, Congress has made the change by reference, incorporating the prevailing law in the applicable jurisdiction.

Bankard, 1992, 1992 U.S. Dist. LEXIS 53 at 8 (citation omitted, emphasis added).

Similarly, in *VenturTech II*, the court stated:

> Congress, through [§ 27A], is not directing a particular finding of fact or decision on the merits. The new provision only prohibits the application of a new rule of law. Additionally, Congress has not attempted to change the result in certain cases without changing the underlying law. Congress changed the law by preserving the statutes of limitations applicable in § 10(b) and Rule 10b-5 cases filed prior to June 19, 1991.

VenturTech II, No. 88-1012-Civ-5-H at 3-4. *Accord Ayers*, Slip. Op. No.C-1-90-650 at 3-4 ("By enacting [§ 27A], Congress has not 'prescribe[d] a rule for the decision of a cause in a particular way.'").

Thus, as these cases make clear, § 27A is not specifically tailored to determine the outcome of this or any other case, and does not prejudge any facts. Indeed, the legislation applies to scores of cases across the country. In order for defendants' view to prevail, § 27A would have had to instruct this Court on how to resolve *this* case. That has not happened. Defendants have their defenses on the merits. They simply have those defenses as they existed on June 19, 1991.

Further, as these cases point out, Congress has changed the underlying law. Prior to the enactment of § 27A, the statute of limitations for § 10(b) actions commenced on or before June 19, 1991 was the one year/three year statute of limitations found in Section 9(e) of the Exchange Act. *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, ___ U.S. ___, 111 S. Ct. 2773 (1991). By enacting § 27A, Congress changed the statute of limitations for these § 10(b) actions to the limitations period that existed in the applicable jurisdiction on June 19, 1991, prior to *Lampf*.[1] Here in the Fifth

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1 § 27A provides in pertinent part:

(b) Effect on Dismissed Causes of Action. Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991 —

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) *which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991*,

shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section. (emphasis added).

Circuit, the statute of limitations for § 10(b) actions on June 19, 1991 was the four year statute of limitations found in an analogous Texas state law. *Sioux, Ltd., Secur. Litigation* v. *Coopers & Lybrand*, 914 F.2d 61 (5th Cir. 1990), *citing Longden* v. *Sunderman*, 737 F. Supp. 968, 971-972 (N.D. Tex. 1990). Thus, it is clear that Congress has changed the underlying law. The fact that Congress changed the law by reference to judicially created law, including principles of retroactivity, is irrelevant. *Bankard, supra. See also VenturTech II, supra; Ayers, supra; Sims, supra.*[2]

Defendants cite two cases in support of their contention that § 27A is unconstitutional, *United States v. Klein*, 80 U.S. 128, 146-147 (1871) and *Seattle Audubon Soc.* v. *Robertson*, 914 F.2d 1311, 1315 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 2886 (1991). However, by defendants' own admission, neither case applies where, as here, Congress has changed the underlying substantive law.

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2 Other district courts have applied the new limitations period found in § 27A, without even addressing any constitutional issues, which further demonstrates that § 27A is a proper exercise of Congress' legislative powers. *See e.g., Ades, et al.* v. *Deloitte & Touche, et al.*, 1992 U.S. Dist. LEXIS 12 (S.D.N.Y. January 3, 1992) (attached as Exhibit F hereto); *Ahmed, et al.* v. *Trupin, et al*, 1992 U.S. Dist. LEXIS 207 (S.D.N.Y. January 10, 1992) (attached as Exhibit G hereto); *Adams Ass., et al.* v. *JEM Management Ass. Corp., et al.*, 1992 U.S. Dist. LEXIS 1283 (S.D.N.Y. February 7, 1992) (attached as Exhibit I hereto). In addition, another district court has rejected attacks on § 27A's constitutionality and will be issuing a memorandum opinion. *American Continental Corporation / Lincoln Savings and Loan Sec. Lit.*, MDL No. 834 (D. Ariz.) (See February 7, 1992 Order, p. 4, attached as Exhibit J hereto). Only one court has found § 27A to be unconstitutional, but has not yet issued a written opinion nor articulated its reasons for so finding. *In re Brichard Securities Litigation*, No. C 87-2987-Cal (N.D. Cal.).

Finally, Congress' motive for enacting § 27A is irrelevant in determining whether the statute violates the separation of powers doctrine. The Supreme Court has expressly recognized the impropriety of inquiring into Congress' motive in separation of powers cases. In *United States* v. *O'Brien*, 391 U.S. 367, 383-84 (1968), the Supreme Court explained:

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive...
>
> Inquiries into congressional motives or purposes are a hazardous matter .... We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser speech about it."

Accord Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) (in upholding the constitutionality of a repeal of a law, Supreme Court stated "[w]e are not at liberty to inquire into the motive of the legislature. We can only examine into its power under the Constitution ...").[3]

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3. That § 27A may be the result of "political compromise" (def. brief p. 3) is also irrelevant and has absolutely no bearing on the constitutionality of the statute. Indeed, many laws enacted by Congress are the result of "political compromise."

II. DEFENDANTS HAVE NO VESTED RIGHT IN THE COURT'S PRIOR RULING

Contrary to defendants' contentions, as of the date of § 27A's enactment, no final judgment was entered in this case. On August 15, 1991 this Court entered two orders relating to the dismissal of Plaintiff's action — a "Memorandum Opinion and Order" ("Memorandum Opinion") and an "Order Granting Leave for Defendants to Supplement Their Pending Motions to Dismiss the First Amended Complaint and Dismissing the First Amended Complaint" ("Order of Dismissal").[4] Plaintiff subsequently filed an unopposed motion to amend the Order of Dismissal to make it consistent with the Memorandum Opinion. (Attached as Exhibits K, L and M hereto are the motion and Orders). Defendants in essence joined with plaintiff in moving to amend the Order of Dismissal.

As of the date of § 27A's enactment, however, the Court had not ruled on this motion. Accordingly, no final judgment was entered in this case that could have even colorably vested any rights in defendants.

However, even assuming a final judgment had been entered on plaintiff's federal securities claim, defendants still could not have a fundamental, constitutional vested right in that ruling such that § 27A's application to plaintiff's federal claim would amount to a constitutional violation. This is because statutes of limitations do not create vested rights, but serve as arbitrary, legislative cut-offs of a plaintiff's right to pursue a

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4 The Memorandum Opinion stated that Count I (Federal Securities Count) was dismissed with prejudice as time barred and that Count II (State Common Law Fraud claim) was dismissed *without* prejudice based upon the Court's declination to exercise pendent jurisdiction.

remedy. *Chase Secur. Corp.* v. *Donaldson*, 325 U.S. 304 (1945). *See also VenturTech II*, No. 88-1012-Civ-5-H at 4. As the Supreme Court in *Chase* observed:

> [statutes of limitation] have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right ... [litigants] may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Chase, 325 U.S. at 314.

While defendants rely on *Chase* to support their contention that § 27A is unconstitutional, interestingly enough, *Chase* warrants the contrary conclusion.

In *Chase*, like here, there was an adjudication of only one of the plaintiff's remedies — the securities claim was found time-barred, but the common law fraud claim remained. After a final adjudication holding that plaintiff's securities claim was time-barred, the legislature enacted a new statute of limitations which by its express terms had retroactive application and which made the previously adjudicated time-barred securities claim timely.

The Supreme Court found that the revival of plaintiff's securities claim did not violate any constitutional proscription. All that it did was make an additional remedy available to the plaintiff. This was due to the fact that the plaintiff, like Pacific Mutual, had at the time the legislation was enacted, a viable common law fraud claim pending against the defendants. As a result, the revival of one additional remedy did not in the Court's mind trigger any fundamental constitutional question.

Moreover, as in *Chase*, a reinstatement of this action would not pose any special hardship for defendants. Defendants initially participated in this litigation on the assumption that plaintiff's § 10(b) claims were timely. Although *Lampf* may have given defendants the opportunity to avoid litigating the § 10(b) claims, the reinstatement of these claims presents no special hardship or unfair surprise to defendants. Indeed, as defendants well note, they are still litigating the common law fraud claim. See Def. Mem. at 3, n.4. All that § 27A does is to expand plaintiff's remedies. *See Chase*, 325 U.S. 304. *See also VenturTech II*, No. 88-1012-Civ-5-H at 4.

For all the foregoing reasons, this Court should uphold the constitutionality of § 27A.

III. CONCLUSION

For the foregoing reasons, plaintiff respectfully requests the Court to grant plaintiff's motion to reinstate this action.

Respectfully submitted,

Dated: February 28, 1992

By: _____

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